ILE COPY

Office Supreme Court, U.S.
FILED
OCT 20 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

No. 460

OCTOBER TERM, 1958

J. W. McDAVID, PETITIONER,

versus

FORD MOTOR COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

C. T. GRAYDON,
1225 Washington Street,
Columbia, South Carolina,
Counsel for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	13
Appendix (Opinion Below)	17

CITATIONS

Cases: PAGE

Barnwell v. Elliott et al., 225 S. C. 62, 80 S. E. (2d) 748. 8

Bernhardt v. Polygraphic Co. of America, 76 S. Ct. 273, 350 U. S. 198, 100 L. Ed. 199 9

Carpini v. Pittsburgh and Weirton Bus Company and General Motors, C. C. A. 3, 216 F. (2d) 404 12

Ford Motor Co. v. Malone, C. C. A. 4, 205 F. (2d) 267.. 12

Hiers v. South Carolina Power Co., 198 S. C. 280, 17 S. E. (2d) 698 8

Kyle v. Swift & Co., C. C. A. 4, 229 F. (2d) 887 11

Major v. McCurdy, D. C., E. D. S. C., 1953, 118 F. Supp. 537 7

Moorer v. Dowling, 216 S. C. 456, 58 S. E. (2d) 734 7

Odum v. Weathersbee, 225 S. C. 253, 81 S. E. (2d) 788.. 8

Pierce v. Ford Motor Co., C. C. A. 4, 190 F. (2d) 910, Cert. Den. 72 S. Ct. 178, 342 U. S. 887, 90 L. Ed. 666. 12

Rogers v. Missouri P. Ry. Co., 352 U. S. 500, 1 L. Ed. 493, 77 S. Ct. 502 11

Shulz v. Pennsylvania R. Co., 350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608 9

Tallevast et al. v. Herzog et al., 225 S. C. 563, 83 S. E. (2d) 204 8

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409 10

Woodle v. Brown, 223 S. C. 204, 74 S. E. (2d) 914 8

Miscellaneous:

88 Corpus Juris Secundum, Trial No. 208, pp. 422-423.. 8

United States Constitution, Seventh Amendment 11

Supreme Court of the United States

OCTOBER TERM, 1958

J. W. McDAVID, PETITIONER,

versus

FORD MOTOR COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on August 29, 1958.

CITATIONS TO OPINIONS BELOW

The order of the District Judge overruling respondent's motion for judgment n.o.v. is contained on pages 130 and 131 of the joint appendix. Since the trial was before a jury, no other order was issued and there is no printed report of the case from the Trial Court.

The opinion of the Circuit Court of Appeals, issued on August 29, 1958, is printed in the appendix hereto and will be reported in Federal Reporter Second.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 29, 1958, and a 60-day stay order was subsequently granted by that Court. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The sole issue raised in this petition is whether or not an appellate court is to be allowed to substitute its judgment for that of a jury in a case in which there is a reasonable inference of a manufacturer's negligence.

In other words, the only question is whether or not the record presents a jury issue. The question is a proper grounds for issuance of a writ because of the increasing divergence in views between Circuit Courts as to the role of the jury and because of the failure of the Fourth Circuit to apply and follow the South Carolina rule.

STATEMENT

Plaintiff was injured near Camden, South Carolina when the right front tire of a new Ford blew out after only 2,000 miles of travel. Ford admits the tire was not of defective manufacture.

Ford's Camden dealer was notified and Ford's regional representatives examined the car and took both front tires to Detroit for testing. They made no report to plaintiff (or his wife) and suits were brought against Ford by plaintiff and his wife for personal injuries in the South Carolina courts. The suit by the wife for $3,000.00 was tried in the South Carolina court and resulted in a jury verdict for Mrs. McDavid which was paid after appeal was abandoned. This suit for $50,000.00 for personal injuries was removed to the United States District Court.

After suits were commenced, Ford attempted to shift the blame to the authorized Ford dealer from whom the car was purchased. The changing of the steering mechanism by this dealer was invoked as such an "intervening cause" as to relieve Ford of all liability.

But the testimony by plaintiff showed that the type of wear which caused the blowout was due to a factory adjustment not affected by the steering mechanism change. Without going into the technical differentiations which were presented in great detail at trial, the steering change affected **toe-in** while the wheels' vertical alignment was controlled by a factory-set **camber** adjustment.

Camber is adjusted by the insertion of shims in bolts which control the vertical tilt of each front wheel. Each adjustment must be made individually at the factory, and Ford's service instructions did not call for any further adjustment during the service period. In other words, the record shows that the camber adjustment was made by Ford and was not thereafter changed by the two Ford dealers which serviced the McDavid car.

The Trial Judge submitted the case to the jury which brought in a $20,000.00 verdict for plaintiff.

Ford appealed on many grounds, and the Circuit Court of Appeals for the Fourth Circuit reversed on the issue of Ford's liability. Although plaintiff's experts attributed the excessive tire wear to an improper camber adjustment, that court held that the proof of negligence because of camber was insufficient as a matter of law.

The testimony offered by Ford absolved the dealer from whom the car was purchased by plaintiff's wife of all blame, and another of Ford's witnesses cleared the dealer which made the 1,000 mile check of any fault. The mechanics from both of these dealers specifically eliminated any camber adjustment by either of these firms.

The effect of the holding by the Circuit Court of Appeals is a finding of fact that the wear in the tire was caused by some act of the plaintiff's wife, or some unknown party. But this holding is rebutted by:

(1) The fact that the examination of the car after the accident by Ford's representatives showed no prior damage to the steering mechanism.

(2) The fact that the tire tests failed to show any unusual, severe or damaging injury resulting from misuse of the car while driving.

(3) The fact that the plaintiff's wife recalled no such accident or mishap.

(4) The fact that camber, as compared with toe-in, would have a tendency to improve upon the wheel's striking a hole.

(5) The fact that the right front tire showed physical evidence of wear attributable only to a camber maladjustment.

The opinion holds that this "excessive camber could have been introduced by Ford when it initially made the adjustment during assembly of the automobile." But that Court then said that this inference as to camber was tenuous and conjectural and that judgment should be entered for Ford.

The effect of the Circuit Court's ruling was to make a finding of fact that it was the act of Mrs. McDavid or some unknown party which caused the camber maladjustment—and there was not a scintilla of evidence or the slightest inference to support this finding. Having eliminated the two authorized Ford dealers by testimony, Ford left no one else to blame.

And how were Mrs. McDavid and any unknown party absolved? Again, by the acts of Ford which took the tires and had its technical experts examine the steering appara-

tus. Ford did not introduce its technical report on the tires, but no where in the record is there any evidence or even inference that the tires or the steering apparatus had been damaged or otherwise misused.

The reasonable and proper inference from the testimony was that Ford's setting of the camber caused the unusual wear on the right front tire (as compared with much lesser wear on the left front tire).

Toe-in alone would have worn the tires equally so that the only reasonable inference was that excessive camber caused the excessive right tire wear which caused the blow-out.

When the new Ford car rolled over in the ditch, the McDavids immediately and logically notified Ford. And the others to whom they might have looked for redress were eliminated at the trial by Ford's presentation of the case.

REASONS FOR GRANTING THE WRIT

While the Circuit Court admitted the rule that conflicting inferences from circumstantial evidence should be resolved by a jury, for some reason not apparent in the opinion it said that the claim against Ford should be dismissed. The rule adopted by this Circuit Court in this case has the effect of eliminating circumstantial evidence in all cases of this type.

That the Court has retried the factual issues in arriving at its decision is apparent. It has adopted Ford's defense—that is, that Mrs. McDavid abused the car in some way which caused a steering maladjustment. But there is no evidence to support this finding.

Had, for example, the plaintiff sued his wife in addition to Ford, it is our view that the Trial Judge would have had to direct a verdict as to her. But the Circuit Court

has selected her (or some unknown agent) as the party responsible.

What other party should McDavid have sought to hold?

(1) The manufacturer of the tire? But Ford admits that the tire was not defective.

(2) The authorized Ford dealer which sold and serviced the car? But the man who did the work and serviced the car said that he did not adjust camber.

(3) The authorized Ford dealer which serviced the car after 1,000 miles? But the mechanic who did that work disclaimed any responsibility for the camber adjustment.

Like a straw man Ford knocked the dealer by which the car was serviced out of the case by producing the mechanic who actually did the work on this particular car; he said that the changeover to power steering was done with the correct adjustment for toe-in but without touching the camber. So also the 1,000-mile check mechanic said his work on the steering mechanism was correct.

Not one worker, inspector or supervisor from the assembly line in the Ford factory was produced to detail anything specific about the manufacture of the McDavid car. A so-called expert from "Central Staff Quality Control" at the Ford factory testified generally as to the assembly methods, but not one record, not one inspection sheet and not one report was produced with reference to this car—and that included the report which Ford made on the tires involved in this case, although Ford took the tires to Michigan for the purpose of testing the same to determine the cause of the unusual wear in the right tire.

This in effect eliminated everyone but the car's manufacturer (Ford) and the car's owner (the plaintiff's wife). From these two the Circuit Court has selected Mrs. McDavid as the perpetrator of her husband's misfortune. The jury, on the other hand, selected Ford.

In few, if any, of the cases based on a manufacturer's negligence can the claimant produce direct evidence of negligence. The car owner does not have access to the assembly line. Even the jury was not allowed to see anyone from Ford's assembly line. The car owner cannot check the garage where the car is serviced; he is at the mercy of these experts. But the courts have approved the use of circumstantial evidence in such cases.

The case presents a jury issue as clearly as any case based on circumstantial evidence under the South Carolina rule. And we think that this case more than measures up to the rule announced elsewhere.

The rule in South Carolina differs somewhat from that in some other jurisdictions as to the submission of cases to a jury. In *Moorer v. Dowling*, 216 S. C. 456, 58 S. E. (2d) 734, it is stated:

> "Not only should consideration of the facts be submitted to the jury when they are in dispute, but the jury must also pass on the questions of inference to be drawn from such facts after they have been determined. . . .
>
> "If the inferences properly deducible from the evidence are doubtful or if they tend to show both parties guilty of negligence or willfullness, and there may be a fair difference of opinion as to whose act produced the injury complained of as a direct and proximate cause, then the question must be submitted to the jury. *Harrison v. Atlantic Coast Line R. Co.*, 196 S. C. 259, 13 S. E. (2d) 137."

It is not the province of the Court to weigh the testimony, but if there is testimony which tends to establish the material averments of the plaintiff's cause of action, then the issue is one for the jury. *Major v. McCurdy*, D. C., E. D. S. C., 1953, 118 F. Supp. 537.

Some other South Carolina cases are pertinent:

Odum v. Weatherbee, 225 S. C. 253, 81 S. E. 2d 788:

> "It is the law of this state that a case should be submitted to the jury not only when the testimony is conflicting, but likewise when the inferences from it are in doubt."

Hiers v. South Carolina Power Co., 198 S. C. 280, 17 S. E. 2d 698:

> "The jury has the special prerogative to decide the facts, if the evidence tends to sustain the reasonable probability of the manner or way relied upon by the plaintiff even if the injury might have occurred in one of a dozen ways. The law does not require proof to a certainty in a civil suit."

Woodle v. Brown, 223 S. C. 204, 74 S. E. 2d 914 (from the headnote):

> "Under the 'scintilla rule' which prevails in South Carolina, if there is a 'scintilla of evidence' which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for its determination."

See *Tallevast et al. v. Herzog et al.*, 225 S. C. 563, 83 S. E. 2d 204; 88 *Corpus Juris Secundum*, Trial No. 208, pp. 422-423.

The rule in South Carolina as to circumstantial evidence applies even though the doctrine of *res ipsa loquitur* does not obtain in this jurisdiction. The rule is summarized in *Barnwell v. Elliott et al.*, 225 S. C. 62, 80 S. E. 2d 748, as follows:

> "It is elementary that negligence may be established by circumstantial evidence, *Thornton v. Seaboard Air Line Ry. Co.*, 98 S. C. 348, 82 S. E. 433; *Watson v. Coxe Bros. Lumber Co.*, 203 S. C. 125, 26 S. E. (2d) 401. And in considering the sufficiency of such evidence, 'the facts and circumstances shown

should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates.' *Lee v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459, 462. The fact that the doctrine of *res ipsa loquitur* is not applied in this jurisdiction does not mean that negligence may not be established by circumstantial evidence as well as direct evidence. *Eickoff v. Beard-Laney, Inc.*, 199 S. C. 500, 20 S. E. (2d) 153, 141 A. L. R. 1010. It is also important to bear in mind that the fact that an injury may have been caused in one of two or more ways does not preclude recovery, 'if the facts and circumstances in evidence warrant a reasonable inference that it was caused in any way alleged in the complaint for which the master would be liable.' *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639, 643."

That the liability is to be determined in accordance with the law of South Carolina is well settled. *Bernhardt v. Polygraphic Co. of America*, 76 S. C. 273, 350 U. S. 198, 100 L. Ed. 199. The function of the jury has been set out by this Court in numerous cases, and it is not essentially different from that in South Carolina—although the scintilla rule is not in effect in the majority of jurisdictions.

But whether the evidence here is tested by the "scintilla" rule or the "reasonable inference" rule, a jury issue was presented and the opinion of the Circuit Court is a usurpation of the jury's function. The general rule as to the role of the jury has been considered by this Court in many cases.

In *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608, this Court reversed in a case brought under the Jones Act when the Trial Judge refused to submit the issue of negligence, based on purely circumstantial evidence, to a jury. The Circuit Court had affirmed the District Court. And this Court said in language hearten-

ing to those who believe in the fact-finding function of the jury:

100 L. ed 671:

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones v. East Tennessee V & G. R. Co.*, 128 U. S. 443, 445, 32 L. ed. 478, 480, 9 S. Ct. 118 (1888)."

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409, this Court granted *certiorari* in an action brought under the Federal Employees' Liability Act when a Circuit Court reversed a jury award. This Court said in that case:

88 L. ed 525:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the

court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; *Tiller v. Atlantic Coast Line R. Co., supra* (318 U. S. 68, 87 L. ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353, 354, 87 L. ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Both these cases were brought under statutes providing for jury trial, but the Seventh Amendment specifically preserves and protects the fact-finding function "according to the rules of the common law."

Similar cases were presented in *Rogers v. Missouri P. Ry. Co.*, 1 L. Ed. (2d) 493, 515; *Webb v. Illinois C. R. Co.*, 1 L. Ed. (2d) 503, 515; *Herdman v. Pennsylvania R. Co.*, 1 L. Ed. (2d) 508, 515, and *Ferguson v. Moore McCormick Lines*, 1 L. Ed. (2d) 511, 515. As stated in the *Rogers case*, a jury question is presented when a conclusion may be drawn fixing liability "whether or not the evidence allowed the jury a choice of other probabilities. Circumstantial evidence is not only sufficient, but may be more satisfying and convincing in meeting these criteria than direct evidence."

The action here is a common law one for negligence—and as the Fourth Circuit said in *Kyle v. Swift & Co.*, 229 F. (2d) 887:

"It is well settled that for such purpose the evidence must be viewed in the light most favorable to the plaintiff and every inference favorable to the plaintiff which can reasonably be drawn therefrom must be drawn."

In the cases cited by the Circuit Judge in support of that Court's opinion, there was no evidence of specific defects in the particular machine or vehicle involved, but here there was positive evidence as shown on the face of the tire of a defect in **camber**—a factory adjustment.

The cases which are most persuasive of our position came from the Fourth Circuit: *Pierce v. Ford Motor Co.*, 190 F. (2d) 910, cert. den. 72 S. Ct. 178, 342 U. S. 887, 90 L. Ed. 666 and *Ford Motor Co. v. Malone*, 205 F. (2d) 267. Those cases are almost identical with this case on the facts, and the law applied there is the law which would have applied here. The Circuit Court specifically passed on a case in which the shims had been adjusted by a mechanic of the authorized Ford dealer; the Court held that this made a **jury issue.**

As in *Carpini v. Pittsburgh and Weirton Bus Company and General Motors*, 216 F. (2d) 404, Ford cited its experience and care on its assembly line. But as the Third Circuit Court said in the *Carpini case* of similar evidence: "But, of course, it was not conclusive any more than evidence of general practice in an industry is conclusive on whether operations are conducted with due care."

In this case, the Fourth Circuit has adopted a judicial rule in weighing the sufficiency of the evidence which is contrary to the rules set down by this Court, by itself, by other Circuit Courts and by the Supreme Court of South Carolina. It says in effect that the reasonable and logical explantation of the blowout—wear caused by a factory maladjustment of camber—"is so tenuous that it rests merely upon speculation and conjecture."

We are aware that this Court cannot consider every case which is wrongly decided by Circuit Courts, but this is a case in which this Court can spell out in a negligence case the guiding principles which are to govern Circuit Courts in such cases so that the litigant in the Fourth Circuit obtains the same treatment as those elsewhere.

The verdict of a jury is conclusive on an appellate court in a case where the evidence supported that verdict. This was such a case, for the evidence of the cause of the wear which resulted in the blowout pointed to Ford alone.

The defect was one which could not be seen upon an ordinary inspection, and the fact that the dealers did not discover the defect could in no wise absolve Ford from liability for its negligence.

The factual issue was resolved against Ford by a South Carolina jury; the Federal District Judge properly overruled Ford's motions for a direction of verdict in its favor. The Circuit Court erred in taking the case from the jury.

CONCLUSION

That is the basis upon which we seek review by this Court; the jury is the fact-finding arbiter under our system of jurisprudence. That principle needs to be declared in common-law negligence cases by this Court.

Respectfully submitted,

C. T. GRAYDON,
AUGUSTUS T. GRAYDON,
1225 Washington Street,
Columbia, South Carolina,

JOHN C. WEST,
Camden, South Carolina,
Attorneys for Petitioner.

The opinion of the United States Court of Appeals for the Fourth Circuit was written by Judge Haynsworth, Circuit Judge. The case was argued on April 17, 1958, and decided on August 29, 1958. The opinion is as follows:

HAYNSWORTH, Circuit Judge:

The plaintiff was a passenger in an automobile, owned and driven by his wife, when there was a blowout of the right front tire. Mrs. McDavid lost control of the automobile, which ran into a ditch, and the plaintiff was thrown to the floor. He sought compensation for his personal injury from the manufacturer of the automobile upon the theory that the blowout was caused by excessive wear of the tire which, in turn, was attributable to negligence of the manufacturer in aligning the wheel. The defendant's motions for a directed verdict and, after the verdict, for judgment notwithstanding the verdict were denied. The appeal presents the question of the sufficiency of the proof to support the verdict.

Although the automobile had been driven only 2600 miles, the blowout occurred because the tire had worn through the fabric. The wear of the left front tire was less extensive, but greatly excessive for the distance travelled.

From the appearance of the tires, it was established that a major cause of the excessive wear was the "toe-in" of the front wheels. Toe-in is adjusted by turnbuckles on the tie rods by means of which the front wheels may be rotated on their vertical axes. Proper front wheel alignment on most automobiles requires a small degree of toe-in, so that the distance between the center lines of the two tires measured at the front is less than the distance between them measured at the rear of the tires. Obviously, if there is too much toe-in, the front tires will scrape and scuff along the roadway, and wear will be rapid and excessive. Toe-in may be so maladjusted as to cause new tires to wear-out in a few hundred miles of travel.

It is apparent that the center of the wear of the right front tire of the McDavid automobile did not coincide with the center line of the tire, and the outer edge shows greater wear than the inner. This indicates maladjusted camber. Proper front wheel settings require some positive camber,

a tilting of the wheel along its horizontal axis so that the distance between the two front tires is greater at their tops than at the road surface. The weight and springing of the loaded vehicle counteracts optimum positive camber, however, so that the center line of tire wear should coincide approximately with the center line of the tire's tread. Excessive positive camber shifts the center line of wear outwardly from the center line of the tread and will reduce the useful life of the tread.

The witnesses differed greatly in their estimates of the contribution of the camber adjustment to the excessive wear of the right front tire. Some thought it negligible, explaining that excessive toe-in causes more rapid wear of the right front tire than of the left.[1] A witness for the plaintiff, however, attributed the difference in the wear of the two front tires entirely to excessive camber in the right front wheel.

While it is obvious that the scraping action which excessive toe-in occasions can quickly result in complete tire failure and that excessive camber holds no comparable threat of early danger, it is apparent from the foregoing that the proof established that failure of the tire was caused by misalignment of the front wheels and would warrant a finding that the misalignment consisted of a combination of excessive toe-in and excessive camber in the right front wheel. The plaintiff, however, could carry in no such satisfactory manner his burden of proving that Ford Motor Company was responsible for the condition which existed at the time of the accident.

This particular automobile was delivered by Ford in February 1954 to Clem Davis, Inc., an authorized Ford dealer in Jackson, Michigan. It was held in stock there for almost six months, until August 23, 1954, when it was sold to Mrs. McDavid. Meanwhile, however, on August 14, 1954,

[1] Since toe-in is controlled by tie rods connecting the two wheels, it affects each equally if the vehicle is operated on a flat surface. On crowned roads, however, the natural tendency of the vehicle to move toward the lower edge of the roadway is countered by slight steering pressure to the left. This steering pressure reduces the excessive toe-in of the left front wheel and increases that of the right. The right wheels, on crowned roads, also bear the greater weight.

the power steering with which it had been equipped was removed for installation upon another automobile and was replaced by conventional steering. This exchange included the tie rods and other members of the steering linkage, so that all of the controls of the toe-in, as set in the factory, were completely removed and replaced by others. The toe-in was then reset with the controls associated with the substituted steering apparatus. Whatever the toe-in adjustment immediately after the exchange of power steering for conventional steering, it was the work of Clem Davis, Inc., not of Ford Motor Company.

Camber, under the procedures followed by Ford at that time, was gaged and tested by machine. Camber, itself, as caster, the rearward inclination of the top of the kingpin, is adjusted on Ford automobiles of that model year by the insertion or removal of shims, or fillers, on bolts at two control points. Each testing machine is checked each four hours, and, if found to be inaccurate, there is a manual re-check of the caster and camber settings on all cars which had passed through during the preceding four-hour period.

In addition to the machine tests of the camber setting at the factory, there is testimony that this factor in wheel alignment and the toe-in were checked on the McDavid automobile, (1) by Clem Davis, Inc., on August 14, 1954, when the exchange of the steering systems was accomplished, (2) by Clem Davis, Inc., on August 23, 1954, as part of the routine pre-delivery procedure, at which time the original tires were replaced with others, (3) by Clem Davis, Inc., on August 31, 1954, as part of the "300 mile inspection," and (4) by Eger Motors, Inc., of McKeesport, Pa., as part of the "1000 mile inspection." The mechanics who did the work did not recall the particular automobile, but they described the procedure and testified generally that if the camber or toe-in was maladjusted, their checks would have revealed the fact and it would have been corrected.

At the time of the "1000 mile inspection," the actual mileage was 1287, approximately half of the total mileage at the time of the accident. If the misalignment which caused the complete failure of the tire at 2600 miles was

present at the time of purchase, the wear, particularly the feather edges characteristic of wear from excessive toe-in, should have been obvious upon the most casual inspection at 1287 miles.

Alignment of front wheels requires the coordinate adjustment of several related angles. Disruption of one may affect others, and perfect alignment is not so permanent that it may not become maladjusted in the course of normal use. Excessive toe-in and excessive camber can be caused by hitting a curb while parking diagonally against it, by glancing blows, when driving, against curbs, pavement edges, railroad tracks, holes and bumps. The plaintiff's principal expert said of excessive toe-in, "It can also be caused by the type roads the person drives over. I have a few farmers as my customers. And they really take a terrific licking out there. You know, some of them go through the pasture with their cars and so forth and hitting holes in the road * * *." One of the witnesses also testified that excessive toe-in, itself, increases positive camber, because of the great pressure under weight against the bottom of the scuffing tire.

Mrs. McDavid testified that from the time of her purchase of the car, she alone drove it, except on one occasion in Michigan and she was a passenger in the automobile then. She had parked it diagonally to curbs, but very carefully, and she did not recall having hit a bump or a hole. In parking lots, she said, she always parked the car herself, "and I usually parked it into a place where I can lock it and the attendants wouldn't have to move it."

Mrs. McDavid was asked, however, if "just prior to the accident" she had noticed her tires "squeaking." She replied that she had, that on turns, even at slow speeds, they would screech. Excessive toe-in will cause tires to screech at normal speeds on curves, but it is significant that she does not suggest that this screeching, even at slow speeds, was noticeable during the early weeks of her use of the automobile.[2] At the time of the first inspection, she had complained of a noise in the radio and, at the second inspec-

[2] Mr. McDavid, the plaintiff, did not testify.

tion, of vibration in the left side of the dash, but, apparently, she made no mention of screeching tires.

We held in *Pierce v. Ford Motor Co.*, 4 Cir., 190 F. (2d) 910, applying the laws of Virginia, that an automobile manufacturer was liable in a tort action for injuries sustained by occupants of a new automobile, driven only 900 miles, when it appeared that the turnbuckles on the tie rods were not secured in the final assembly of the car, so that in use they turned, causing excessive toe-in, the complete failure of one of the front tires and the resultant injuries. We need not consider whether a similar conclusion would be reached under the laws of South Carolina[3] if the proof

---

[3] In this case in the diversity jurisdiction, we look to the laws of South Carolina, where the action was tried, first, to determine how she would resolve the conflict of laws question. The general rule, in similar tort cases, is that the controlling laws are those of the state in which the injury is suffered rather than those of the state in which the defendant acted. It has been tacitly applied by the Supreme Court of South Carolina. *Burnette v. Augusta Coca-Cola Bottling Co.*, 157 S. C. 359, 154 S. E. 645. See, also, *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; *Pierce v. Ford Motor Co.*, 4 Cir., 190 F. 2d 910; *Rogers v. White Metal Rolling and Stamping Corporation*, 2 Cir., 249 F. 2d 262; *Wright v. Carter Products, Inc.*, 2 Cir., 244 F. 2d 53; *Carpini v. Pittsburgh and Weirton Bus Company*, 3 Cir., 216 F. 2d 404; *Sanders v. Glenshaw Glass Co.*, 3 Cir., 204 F. 2d 436; *Moran v. Pittsburgh-Des Moines Steel Co.*, 3 Cir., 166 F. 2d 908; *Reed & Barton Corporation v. Maas*, 1 Cir., 73 F. 2d 359. We follow the general rule and conclude that South Carolina would apply her laws, since the accident occurred in that state.

The Supreme Court of South Carolina has had little occasion to consider the rule of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. Though a violation of her Pure Food and Drug Act involves somewhat different considerations, it is established in South Carolina that a manufacturer of products for human or animal consumption is liable in a tort action for injuries or losses caused by a deleterious product. *Gantt v. Columbia Coca-Cola Bottling Co.*, 193 S. C. 51, 7 S. E. 2d 641; *Hunt v. Allied Mills*, 184 S. C. 330, 192 S. E. 356. In *Odom v. Ford Motor Company*, 230 S. C. 320, 95 S. E. 2d 601, the Supreme Court of South Carolina held that the manufacturer was not liable in a tort action for economic loss caused by a defect in a tractor, but approving recognition was accorded the general rule. Mr. Justice Oxner said, "* * * The current trend is to enlarge the liability of the manufacturer to a remote vendee to include any article or product which if negligently made or prepared may reasonably be anticipated to cause injury to those properly using it. * * *."

In the light of what it has said, and at this late date, we would be wholly unrealistic if we assumed that the Supreme Court of South Carolina would now apply the unduly restrictive and long discredited limitation which recognizes no obligation of a manufacturer except to those in privity of contract with him claiming under a breach of warrant. See *Pierce v. Ford Motor Co.*, 4 Cir., 190 F. 2d 910.

showed that the camber of a front wheel was misset at the factory, a condition which will shorten the useful life of the tire tread, but which, unlike loose turnbuckles and excessive toe-in, will permit many thousands of miles of safe operation before it, alone, can create a present threat of danger,[4] for we think the proof insufficient to support the inference that the factory setting of the camber was excessive in this instance.

Examination of the automobile after the accident disclosed no mechanical defect, nor any error or omission in the assembly or adjustment of the parts, which could have caused the wheels to become misaligned. The testimony indicates that all parts were present, intact, tight and in proper order, except for the damage they had sustained in the accident. Unlike the situation in *Pierce v. Ford Motor Co., supra*, there is nothing in the record to show how or when the front wheels became misaligned. All that is known arises out of the appearance of the tires, from which we may infer without doubt that the automobile had been operated for a time with its front wheels badly out of alignment, but how this came to be, and when, is left to surmise.

The maladjusted toe-in could have been introduced by the mechanic at Clem Davis, Inc., who set it after exchanging the steering systems, by one of the other mechanics who subsequently inspected and checked the wheel alignment (though their relevant work sheets do not indicate they changed this adjustment), by a parking lot attendant on one of those infrequent occasions when Mrs. McDavid was unable to park the car in a position from which it was un-

[4] In South Carolina, a manufacturer of a chattel is not liable to a remote vendee for loss caused by a defect which does not make the chattel dangerous in its normal use. *Odom v. Ford Motor Company*, 230 S. C. 320, 95 S. E. 2d 601. See *Wyatt v. Cadillac Motor Car Division*, 145 Cal. App. 2d 243, 302 P. 2d 665. Inevitably, tires wear out, and, if not replaced in time, they become dangerous and will fail. Though a manufacturer may be liable if a defect causes failure of a tire so quickly that the owner's duty of inspection and replacement may not be said reasonably to have arisen, the same result does not necessarily follow if the defect, alone, adversely affects the life of the tire not so immediately or substantially, though, in combination with a condition subsequently arising, it may be said to have contributed to the failure of the tire. See *Hentschel v. Baby Bathinette Corp.*, 2 Cir., 215 F. 2d 102; *Cohen v. Brockway Motor Truck Corp.*, 240 App. Div. 18, 268 N. Y. S. 545.

necessary to move it, or by one or more of the infinite variety of bumps and blows which could have changed the toe-in adjustment during Mrs. McDavid's normal use of the automobile. All that is known with certainty is that it was not caused by the defendant, for, whatever Ford did to set the toe-in, it was completely undone by Clem Davis, Inc.

The excessive camber could have been introduced by Ford when it initially made the adjustment during assembly of the automobile. But it also could have been caused by any one of the mechanics who inspected and checked the camber (including the one who exchanged the steering systems, though the exchange of itself would not alter the camber setting), by a parking lot attendant, or by any one of the infinite variety of bumps and blows, to her, apparently insignificant, which the front wheel might well have sustained during Mrs. McDavid's use of the automobile.

If it were shown that the wheels were misaligned by Ford, it should not be relieved of its responsibility because a dealer under a duty to inspect and correct defects may have been negligent in the performance of its duty. That the excess of camber was not the work of Ford, however, is indicated by (1) its own procedures designed to assure proper camber settings, (2) the repeated, subsequent inspections and checks, which disclosed no fault in the setting and which were made by two different, widely separated dealers, (3) the fact that the last inspection was made at a time when excessive toe-in, if present from the time of purchase, would have been obvious in a most casual inspection of the tire, (4) the fact that a related, and extremely important, factor in wheel alignment was badly maladjusted by someone or by some occurrence for which Ford was in no way responsible, and (5) the fact that Mrs. McDavid noticed the screeching of her tires at low speeds, an indication of the misalignment, not when the car was first purchased, but, apparently, only after the last of the several occasions upon which the wheel alignment was tested and checked.

The old notion that a jury should not be allowed to draw any inference from circumstantial evidence, if the one is as probable as the other, has fallen into discard and

has been replaced by the more sensible rule that it is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.

We think that the inference that Ford was responsible for the misalignment of the right front wheel was so tenuous and conjectural that the defendant's motions should have been granted. There is nothing which points to the defendant, rather than to the many others who subsequently dealt with the car, as the responsible agent; there is much to indicate it was not. Particularly is this true when it is known that camber settings can become altered in ordinary use and the sole predicate of the inference is the appearance of the tire after 2600 miles of operation. *Attaway v. One Chevrolet 5-P Truck*, 228 S. C. 559, 91 S. E. (2d) 270; *Eickhoff v. Beard-Laney, Inc.*, 199 S. C. 500, 20 S. E. (2d) 153; *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459; *Delk v. Liggett & Meyers Tobacco Co.*, 180 S. C. 436, 186 S. E. 383; *Smith v. General Motors Corporation*, 5 Cir., 227 F. (2d) 210.

Many cases, recognizing the rule of a manufacturer's liability in tort actions, nevertheless, have denied recovery because of failure of the proof to establish all of the substantive elements of the wrong or because the necessary inferences are so tenuous and speculative that they may not be reasonably drawn from the circumstantial evidence. See: *Smith v. General Motors Corporation*, 5 Cir., 227 F. (2d) 210; *Lovas v. General Motors Corp.*, 6 Cir., 212 F. (2d) 805; *Davlin v. Henry Ford & Son, Inc.*, 6 Cir., 20 F. (2d) 317; *Green v. Orion Shipping and Trading Co., Inc.*, D., Md., 139 F. Supp. 431; *Sugai v. General Motors Corporation*, D. Idaho, 137 F. Supp. 696; *Senter v. B. F. Goodrich Company*, D. Colorado, 127 F. Supp. 705; *O'Hara v. General Motors Corporation*, E. D., Mich., 35 F. Supp. 319; *Harward v. General Motors Corp.*, 235 N. C. 88, 68 S. E. (2d) 855; *Hirst v. Chevrolet Motor Co.*, 261 Mass. 155, 158 N. E. 332; *Darnell v. Beard*, ... Ky. ...., 296 S. W. (2d) 743;

Ayers v. Amatucci, 206 Okla. 366, 243 P. (2d) 716; *Fisher v. Sheppard*, 366 Pa. 347, 77 A. (2d) 417; *Reusch v. Ford Motor Co.*, 196 Wash. 213, 82 P. 556; *Tralli v. Triple X Stores, Inc.*, 19 Conn. Sup. 293, 112 A. (2d) 507; *Kalinowski v. Joseph T. Ryerson & Son, Inc.*, 242 App. Div. 43, 272 N. Y. S. 759.

The judgment of the District Court will be reversed and the case remanded for the entry of judgment for the defendant.

Reversed.

FILE COPY

Office-Supreme Court, U.S.
NOV 15 1958
JAMES R. BROWNING, Clerk

No. 460

Supreme Court of the United States

OCTOBER TERM, 1958

J. W. McDAVID,

PETITIONER

FORD MOTOR COMPANY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

NATHANIEL A. TURNER,
Counsel for Respondent,
701 Carolina Life Building,
Columbia, South Carolina.

November 15, 1958.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	PAGE
Opinions Below ..... See Petition, Page	1
Jurisdiction ..... See Petition, Page	2
Questions Presented	1
Statement of the Case	4
Argument	5
I. The Circuit Court did not Misapply the South Carolina Law	7
II. The Decision in this Case Turns on Its Own Facts and Affects Only the Litigants	10
III. There is No Important Federal Question Involved	10
IV. There is No Conflict of Decisions	11
V. The Decision Below was Correct	12
Conclusion	16

CITATIONS

Cases: PAGE

Attaway v. One Chevrolet 5-P Truck, 228 S. C. 559, 91 S. E. (2d) 270 (1956) 7

Boyleston v. Southern Ry. Co., 211 S. C. 232, 44 S. E. (2d) 537 (1947) 15

Carter v. Atlantic Coast Line Railroad Co., 109 S. C. 119, 95 S. E. 357, 11 A. L. R. 1411 (1918) 13

Ford Motor Company v. Mahone, 205 F. (2d) 267 (C. C. A. 4th, 1953) 11

Glover v. Yonce, 188 F. (2d) 870 (C. C. A. 4th. 1951) .. 15

Hicklin v. Jeff Hunt Machinery Co., 226 S. C. 484, 85 S. E. (2d) 739 (1955) 15

Hiers v. South Carolina Power Co., 198 S. C. 280, 17 S. E. (2d) 698 (1941) 9

Horne v. Southern Ry. Co., 186 S. C. 525, 197 S. E. 31 (1938) 15

Jester v. Southern Railway Co., 204 S. C. 395, 29 S. E. (2d) 768 (1944) 9

Johnson v. Metropolitan Life Ins. Co., 206 S. C. 415, 34 S. E. (2d) 757 (1945) 9

Leek v. New South Express Lines, 192 S. C. 527, 7 S. E. (2d) 459 (1940) 8

Locklear v. Southeastern Stages, Inc., 193 S. C. 309, 8 S. E. (2d) 321 (1940) 13

Martin v. Southern Ry., 77 S. C. 370, 58 S. E. 3 (1907) .. 13

Miller v. Atlantic Coast Line R. Co., 140 S. C. 123, 138 S. E. 675 (1926) 13

CITATIONS—Continued

PAGE

Pierce v. Ford Motor Company, 190 F. (2d) 910 (C. C. A. 4th, 1951), cert. den., 72 S. Ct. 178, 342 U. S. 887, 90 L. Ed. 666 11

Scott v. Greenville Pharmacy, 212 S. C. 485, 48 S. E. (2d) 324 (1948) 15

Weston v. Hillyer, 160 S. C. 541, 159 S. E. 390 (1931) .. 8

Woodle v. Brown, 223 S. C. 204, 74 S. E. (2d) 914 (1953) 9

Miscellaneous:

Barron and Holtzoff, Federal Practice and Procedure, Vol. 2, p. 755 10

Prosser, Handbook of Law of Torts (2d) Ed., p. 220 .. 15

Restatement of the Law, Torts, Section 431, p. 1159 15

South Carolina Law Quarterly, Vol. I, p. 213 9

Supreme Court of the United States

OCTOBER TERM, 1958

No. 460

J. W. McDAVID,

PETITIONER

v.

FORD MOTOR COMPANY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The Fourth Circuit Court in the first paragraph of its Opinion stated: "The appeal presents the question of the sufficiency of the proof to support the verdict." This is also the question presented by the Petition although Petitioner distorts the question by stating (Petition page 2):

> "The sole issue raised in this petition is whether or not an appellate court is to be allowed to substitute its judgment for that of a jury in a case in which there

is a reasonable inference of a manufacturer's negligence."

The assumption by Petitioner of the very point in question by the statement above is so patent as to require no extended criticism by Respondent.

Petitioner goes on to cite the alleged "increasing divergence in views between Circuit Courts as to the role of the jury." This "divergence" is nowhere substantiated in the Petition and appears to be a figment of Petitioner's imagination. Similarly the charge that the Fourth Circuit failed to apply the South Carolina rule is without merit in the light of the authorities hereinafter cited.

The real question presented by the Petition is more essentially whether or not Petitioner has succeeded in bringing himself within the purview of Supreme Court Rule 19—1-(b), which, though not controlling on the Court's discretion, serves as a guide to the bar in seeking the exercise of *certiorari* jurisdiction. With due regard for the finality of the Court's discretion, Respondent respectfully submits that Petitioner has not advanced a meritorious reason for the granting of the writ in the light of the above Rule.

In addition to the question which Petitioner raises as presented by the Petition, there are three additional questions presented which concern additional grounds on which the decision of the Circuit Court could have rested:

(1) Assuming that the maladjustment of camber originated at the Ford factory, was the possible resulting inference of negligence rebutted to such an extent that no reasonable inference of negligence or lack of due care remained?

(2) Was there no reasonable inference that the acts intervening between the factory and the accident could be foreseen by Ford Motor Company so as to preserve the

unbroken causal relationship required between Respondent's act and Petitioner's injury?

(3) Was there no reasonable inference that Respondent could foresee as a probability an injury resulting from its act, thus no reasonable inference of a proximate relationship between act and injury?

Respondent submits that each of the questions above must be answered affirmatively and constitute additional grounds on any one of which the Circuit Court decision could have rested.

Mindful of the requirements of Rule 15 (1)-(c) (1) as to brevity, Respondent nevertheless feels obligated to guard against the possibility of summary reversal along with the grant of the Petition by respectfully noting herein that the Circuit Court found it unnecessary to consider nine separate exceptions to the proceedings of the District Court, any one of which, if affirmed, would have entitled Respondent to a new trial. *

---

* I. Did the District Court err in refusing to strike the following allegations from the Complaint: (a) The following from Paragraph 3: "* * * which vehicle was represented to be and should have been free from all mechanical defects"; (b) All of subparagraph "c" of Paragraph 5, as follows: "In representing or causing to be represented to plaintiff's wife that her said motor vehicle was in good condition"; (c) All of subparagraph "a" of Paragraph 5, as follows: "(a) In allowing a mechanical defect to remain in the said vehicle, which defect caused extensive wear on the tires of the said vehicle resulting in one of the tires blowing out"?

II. Did the District Court err in charging Plaintiff's Sixth Request to Charge as follows: "I charge that if you find that the manufacturer of this automobile negligently permitted it to be delivered to the dealer with an improper camber adjustment which resulted in tire wearing to the cloth, while being driven by the buyer, the manufacturer would be liable to any one injured in an accident resulting directly and proximately I add, from the manufacturer's negligence, notwithstanding inspections or changes made by the dealer from whom the automobile was purchased."?

III. Did the District Court err in charging Plaintiff's Eighth Request to Charge as follows: "In order for a cause to be a superceding cause, it must entirely supercede the operation of the negligence of the defendant so that such cause alone, without the defendant's negligence contributing in the slightest thereto, in fact produced the injury"?

IV. Did the District Court err in refusing to Charge: (a) The second sentence of Defendant's Second Request for Charge, the entire second request being as follows: "I charge you, Mr. Foreman and Gen-

STATEMENT OF THE CASE

Petitioner's Statement of the case (Petition, pages 2-5) is not that "concise statement of the case containing the facts material to the consideration of the questions presented" called for by Rule 23 (1) (e). It incorporates instead an inaccurate and argumentative dissertation on the merits and as such is not acceptable to Respondent.

It is manifest that the presentation of all facts material to the question of whether or not a jury issue was presented would require an exhaustive detailing of the testimony of all the witnesses so that the Court could judge for itself whether there were such conflicting reasonable inferences as would require submission to the jury. Rather than unduly burden the Court with a statement of this type or attempt to correct what are regarded as inaccuracies in Petitioner's Statement, reference is craved to the Fourth Circuit Court Opinion, reprinted in the Appendix to the

---

tlemen, that, if you should find that the damage claimed by the plaintiff, if any, was not the proximate result of negligence on the part of the defendant, but was the result of some act of some third person, then you must find for the defendant. If you should find in favor of the defendant, Ford Motor Company, your verdict would not bar the plaintiff from proceeding against any other person or firms whose alleged negligence may have caused such injuries as he may have received."; (b) Defendants' Sixth Request for Charge which was identically the same as the second sentence of the Second Request as set forth above?

V. Did the District Court err in charging the jury that the Defendant admits it has agents within the State of South Carolina and within the jurisdiction of the Court?

VI. Did the District Court err in charging the jury as follows: "So, as I see this case, the sole question here is whether or not the defendant's negligence had a causal relation to the plaintiff's injuries; whether the defendant was negligent and whether or not that negligence occasioned or brought about the injuries of which the plaintiff complains; that is, brought it about as an immediate, proximate, efficient cause of it, and without which what plaintiff complains of would not have happened. That is what the plaintiff must establish."?

VII. Did the District Court err in permitting the introduction of testimony as to what the Bear Manual showed regarding types and causes of tire wear?

VIII. Was the verdict so excessive as to indicate prejudice, caprice, passion or other considerations not founded on the evidence?

IX. Was the defendant prejudiced by the District Court's examination of each of Defendant's witnesses and by various comments of the Court during the course of the trial?

Petition, which sets out with reasonable thoroughness the essential facts necessary for consideration of the questions presented.

ARGUMENT

At the outset, Respondent submits that Petitioner has not advanced a meritorious argument for the granting of the writ. On the contrary, as will be pointed out, every aspect of the case militates against the granting of the writ. The case turns upon its own particular facts and as such, presents a narrow question of evidence which affects no one other than the litigants. No federal question is presented, no constitutional issue, and no issue which requires for sake of uniformity the guidance of an opinion by this Honorable Court. Moreover, there is no conflict of decisions on the issues presented, nor is this by any stretch of the imagination a subject of great national moment or public interest. Lastly, the result is inherently just and right and is supported by the law of South Carolina as well as the general law elsewhere. Respondent respectfully urges that under these circumstances the petition should be denied.

There are several points made by Petitioner in his Statement which must be corrected in order to set the record straight.

First, Petitioner states that suit by Mrs. McDavid in the South Carolina state court resulted in a jury verdict for Mrs. McDavid which was paid after appeal was abandoned (Petition, page 2). This is inaccurate. Mrs. McDavid's case was compromised while appeal was still pending.

Secondly, the Petitioner states that the record shows that the camber adjustment was made by Ford and was not thereafter changed by the two Ford dealers who serviced the car. As is so aptly pointed out, however, by the

opinion of the Court of Appeals, in the light of the thoroughness of the factory procedures and the four separate inspections of camber which ensued, the only reasonable inference is that the camber adjustment was correct and required no change by the dealers who inspected the car. It may be added parenthetically that the service instructions did call for the subsequent checking of the camber setting and Petitioner's implication to the contrary is erroneous.

Throughout the history of the case, Petitioner has had the marked tendency to assume that the maladjustment of camber occurred at the factory. This is striking in the light of the fact that Petitioner did not present any testimony whatsoever to refute the testimony of Respondent as to the care exercised at the factory. Nor could Petitioner produce one witness to refute the fact that camber-setting had been repeatedly checked thereafter for accuracy. Indeed Petitioner attempts to overcome the convincing effect of this evidence by testimony that after the accident inspection did not show any prior damage to the steering mechanism or misuse of the car while driving. Obviously this cannot have the effect of showing that the camber maladjustment occurred at the factory. Just as apparent is the fact that just because Mrs. McDavid could not recall any mishap this could in no wise establish that the factory had not set the camber properly. Actually her testimony was most helpful in establishing just the contrary inference (Appendix to Petition, page 20). Petitioner's insistence that camber would be improved by the car striking a hole, incorrectly assumes that every lick or bump comes from only one direction, namely, that direction which would tend to reduce a positive camber maladjustment. To the contrary, substantially all of the blows to or forces exerted against a wheel and tire come from the outside and are directed at the lower portion of the tire

which would tend to **increase** the positive camber, such as bumping or striking a curb either in angle or parallel parking or hitting any other immovable or fairly stationary object.

The unusual wear on the right front tire may perhaps have been caused by improper camber, though the weight of the testimony was to the contrary, but Petitioner simply failed to carry the burden of proving Respondent's responsibility for this condition.

I

The Circuit Court did not misapply the South Carolina Law.

The Circuit Court chose to rest its decision on the ground that the inference that Ford was responsibile for the wheel misalignment was so tenuous and conjectural as not to merit submission to the jury. That the *South* Carolina decisions support this rationale is quite clear and Petitioner's insistence that the South Carolina rule was violated is without merit.

In *Attaway v. One Chevrolet 5-P Truck*, 228 S. C. 559, 91 S. E. (2d) 270 (1956), the action was based on allegations of negligence in the loading of a truck from which a mattress fell, indirectly causing plaintiff's injury. The Supreme Court of South Carolina, in affirming a nonsuit, noted certain testimony to the effect that the mattress had been seen bouncing around on the truck just prior to the accident. After stating that the fact that the mattress fell from the truck was of itself insufficient to show negligence in the loading, the Court went on to say:

> "Of course, an issue may be proven by circumstantial evidence, but for such evidence to be sufficient to warrant a finding of fact, it must lead to the conclusion with a reasonable certainty and have sufficient probative value as to constitute a basis for a legal inference

and not mere speculation. Such facts and circumstances must be reckoned with in the light of ordinary experience and the conclusions deduced therefrom by such as common sense dictates, and not rest upon speculation, surmise, or conjecture. *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459; *Holland v. Georgia Hardwood Lumber Co.*, 214 S. C. 195, 51 S. E. (2d) 744."

In *Weston v. Hillyer*, 160 S. C. 541, 159 S. E. 390 (1931), nonsuit was affirmed, the Supreme Court holding that verdicts cannot rest upon guess or conjecture, it being plaintiff's duty to prove negligence affirmatively. Again, in the case of *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459 (1940), the Supreme Court, in reversing judgment for plaintiff and granting judgment in favor of defendant, stated: "The Plaintiff was bound to show something more than that Defendant was possibly responsible for the decedent's death in order to entitle him to a verdict."

Other South Carolina authority could be cited for the proposition that verdicts cannot rest on mere speculation and conjecture. Indeed the Circuit Court makes ample reference to other authorities. But this is a matter of general law which requires no further substantiation.

Petitioner would have this Honorable Court believe that the South Carolina rule differs somewhat from that in some other jurisdictions as to the submission of cases to a jury. (See Petition, page 7.) Since he cites no authority on the point from other jurisdictions, Respondent is not prepared to say that this statement is erroneous. Respondent is prepared to say, however, that the South Carolina rule is the same as the general rule elsewhere, that is, that unless there is a reasonable inference of a defendant's responsibility for an injury, the case will not be allowed to go to the jury. Examination of the so-called "scintilla" rule

to which Petitioner has referred shows that a "scintilla" has been defined by our Supreme Court as "any material evidence which if true would tend to establish the issue in the mind of a reasonable juror." *Woodle v. Brown*, 223 S. C. 204, 74 S. E. (2d) 914 (1953). This is nothing more than the requirement of the finding of a reasonable inference just as *Hiers v. South Carolina Power Co.*, 198 S. C. 280, 17 S. E. (2d) 698 (1941), implies when it states that submission to the jury is warranted "if the evidence tends to sustain the reasonable probability of the manner or way relied upon by the plaintiff even if the injury might have occurred in one of a dozen ways."

Of interest is the analysis of the scintilla rule by Judge Lanneau D. Lide, one of the most revered judges ever to sit on the bench in South Carolina. Writing in Volume I of the South Carolina Law Quarterly, at page 213, Judge Lide noted the vanishing scintilla rule and concluded that it could scarcely be regarded as of effect in view of the pronouncements of the South Carolina Supreme Court on the subject. He noted the holding of *Johnson v. Metropolitan Life Ins. Co.*, 206 S. C. 415, 34 S. E. (2d) 757 (1945), that the scintilla of evidence must be real, material, pertinent and relevant, not speculative or theoretical deductions. He further called attention to *Jester v. Southern Railway Co.*, 204 S. C. 395, 29 S. E. (2d) 768 (1944), in which a unanimous Supreme Court, after stating the Federal rule, held that the same "is in line with the rule of law prevailing in this state governing the granting of nonsuits and directions of verdicts, although theoretically this Court adheres to the scintilla rule". Judge Lide concludes, "The rule of reason as applied in both the Federal Court and the State Court is substantially the same."

Although it is quite clear that the South Carolina rule does not differ from the Federal Rule, the matter is aca-

demic in any event since Rule 50 of the Federal Rules of Civil Procedure, which has to do with motions for a directed verdict, is a procedural rule. Thus "the state rules of practice have no application to the practice in federal courts with respect to the submission of jury issues, the direction of verdicts or the sufficiency of the evidence to sustain a verdict upon a motion for directed verdict." Barron and Holtzoff, Federal Practice and Procedure, Vol. 2, p. 755.

II

The decision in this case turns on its own facts and affects only the litigants.

Since the questions presented are concerned only with the sufficiency of the evidence to go to the jury, it is clear that the decision in the case would have no effect on other cases which would of necessity stand or fall on their own evidence. It need hardly be said that only rarely are cases identical in factual and evidentiary content. It therefore follows that the decision in this case affects only the litigants and no others.

III

There is no important federal question involved.

It is manifest that there is no important question of Federal law involved in this decision. There are no statutes involved, no constitutional issues, in short, nothing to distinguish this case from the great mass of diversity cases brought in the Federal Courts in which verdicts are directed by the Court.

Petitioner attempts to produce a question by stating that this Court must decide whether an appellate court can usurp the jury's function in a case in which there is a reasonable inference of a manufacturer's negligence. The fact of the matter and the basis of the Fourth Circuit Opinion is that there was no such reasonable inference.

IV

There is no conflict of decisions.

Petitioner nowhere seriously contends that there is a conflict between the Circuit Courts on the questions presented. Indeed since the decision turns on its own particular facts there could not logically be such a conflict. It is insisted that *Pierce v. Ford Motor Company*, 190 F. (2d) 910 (C. C. A. 4th, 1951), cert. den., 72 S. Ct. 178, 342 U. S. 887, 90 L. Ed. 666 and *Ford Motor Company v. Mahone*, 205 F. (2d) 267 (C. C. A. 4th, 1953), are identical on the facts and are the cases most persuasive of Petitioner's position. Those two cases actually arose out of the same accident and are from the same circuit as the instant case, the Fourth Circuit. The *Pierce case* is quite amply distinguished by the Circuit Court in its opinion. In point of fact, however, even were the cases in conflict, which they are not, the present case would be deemed controlling since it is the latest expression of the Fourth Circuit Court on the matter.

Petitioner's citation of cases from other Circuits in which there may have been a jury issue is certainly irrelevant to this case which involves entirely different facts. There is no dispute between the Circuits as to the fact that verdicts can rest on circumstantial evidence where such evidence establishes a reasonable inference. Nor is there dispute on the rule that verdicts cannot rest on speculation and conjecture. Petitioner has not cited any authority holding that a jury verdict must stand where there was no reasonable inference of a defendant's responsibility for the injury. This is patently because these matters governing directed verdicts and sufficiency of the evidence are uniformly interpreted and applied by all the courts of this land.

There being no conflict of decisions, it appears that Petitioner seeks review of a lower court decision which turned solely upon an analysis of the particular facts involved, there being no real dispute as to the factual background of the case. In effect, Petitioner simply wants another hearing of the matter. Respondent respectfully submits that Petitioner misconceives the role of this Honorable Court in the federal system and the factors which motivate the granting of *certiorari*.

V

The decision below was correct.

Respondent would not have the temerity to try to improve on the Fourth Circuit's analysis of the first question presented. The opinion is eminently clear and decisive in its analysis of the matter and thoroughly substantiated by the authorities cited. Attention will therefore be directed to the other grounds on which the Circuit Court could have reached the same result.

(1) *Assuming that the maladjustment of camber originated at the Ford factory, was the possible resulting inference of negligence rebutted to such an extent that no reasonable inference of negligence or lack of due care remained?*

Had it been proved that the maladjustment actually occurred at the factory, this may have raised an inference of negligence and placed upon the manufacturer the duty of showing due care in its processes. If so, this burden was met by the unrebutted showing of due care used at the factory in checking and setting the proper adjustment. (Pages 84, 85 of the Joint Appendix.) Defendant's witness Riding, experienced in the factory procedures, testified as to the unusual degree of care exercised. Not only was each car checked for camber adjustment by machine, but also

the machines themselves were checked every four hours for accuracy. When a machine was found to have deviated from the norm, all cars on the line since the last satisfactory check were rechecked manually for camber adjustment.

Petitioner did not contest in any way whatsoever the testimony above. Not until appeal did he belatedly challenge the expert's qualifications. Never was an attempt made to challenge the reasonableness of the methods. Under the circumstances, no inference of negligence remained to go to the jury and Petitioner failed to sustain the burden of persuasion which again rested upon him.

(2) *Was there no reasonable inference that the acts intervening between the factory and the accident could be foreseen by Ford Motor Company so as to preserve the unbroken causal relationship required between Respondent's act and Petitioner's injury?*

Even assuming that Respondent negligently maladjusted camber, this negligence was insulated by subsequent acts. The South Carolina decisions hold that when the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause. *Carter v. Atlantic Coast Line Railroad Co.*, 109 S. C. 119, 95 S. E. 357, 11 A. L. R. 1411 (1918); *Martin v. Southern Ry.*, 77 S. C. 370, 58 S. E. 3 (1907); *Miller v. Atlantic Coast Line R. Co.*, 140 S. C. 123, 138 S. E. 675 (1926). And *Locklear v. Southeastern Stages, Inc.*, 193 S. C. 309, 8 S. E. (2d) 321 (1940), holds that the intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen in the exercise of due care.

It is a mechanical fact of life that when the steering mechanism on the Petitioner's car was changed from power steering to conventional steering by Clem Davis, Inc., the factory toe-in adjustment was obliterated. Whatever toe-in adjustment was made on the new unit was made by Clem Davis, Inc. or some subsequent person. If toe-in became maladjusted thereafter it was due to the intervention of some independent, efficient agency other than Ford.

That toe-in is the most serious element in the tire wear was nowhere denied. It is a fact that tires with improper toe-in have been known to wear out in 100 miles (Page 56, Joint Appendix). Plaintiff's own expert stated that it would have taken at least 5,200 miles for positive camber alone to have caused the wear on the McDavid tires (Page 38, Joint Appendix). New tires of the same make and type on the same type car showed virtually no wear from having been run 3,501 miles on the test stand with proper toe-in but camber maladjusted to the greatest extent mechanically possible (Pages 99-101, Joint Appendix). The appearance of the actual tire which blew out established that the major cause of wear was the toe-in. The only reasonable inference to be drawn concerning a blowout at 2,600 miles is that the independent and efficient agency of improper toe-in intervened to cause the blowout, and such agency must inevitably be deemed the direct or proximate cause, and the camber maladjustment, if any, and if it resulted at the factory, the indirect or remote cause.

Nor could the intervention of this agency be reasonably foreseen. We are not dealing here with the failure of a dealer to carry out his duty of inspection which admittedly would not relieve Ford if the original negligence had been the work of Ford. We are dealing instead with some positive action which maladjusted toe-in, occurring long after the car left the factory. It could not reasonably have been

foreseen by Ford and thus had the effect of relieving any original responsibility which we assumed Ford to bear for purposes of this argument.

In addition to the above, Respondent submits that prior to 2,600 miles of operation, a duty of inspection and replacement if necessary devolved upon the owner of the car, Petitioner's wife. Her failure to exercise due care with respect to the tires on the car is such negligence as would relieve Respondent of liability.

(3) *Was there no reasonable inference that Respondent could foresee as a probability an injury resulting from its act and thus no reasonable inference of a proximate relationship between act and injury?*

It is clear that Respondent's liability must be predicated on a proximate relationship between act and injury even if negligence be admitted. It is insufficient to say that but for the act the injury would not have occurred. This may establish actual causation but not proximate causation. Restatement of Torts, Section 431, page 1159; Prosser, Handbook of Law of Torts, (2d) E., page 220. One must go further and examine the test of proximate causation as laid down by the South Carolina Supreme Court. This test is as follows: Was the injury a natural and **probable** consequence of the wrongful act, and ought it to have been foreseen in the light of attendant circumstances? *Scott v. Greenville Pharmacy*, 212 S. C. 485, 48 S. E. (2d) 324 (1948); *Hicklin v. Jeff Hunt Machinery Co.*, 226 S. C. 484, 85 S. E. (2d) 739, 743 (1955); *Horne v. Southern Ry. Co.*, 186 S. C. 525, 197 S. E. 31 (1938). Similarly *Glover v. Vance*, 188 F. (2d) 870 (C. C. A. 4th, 1951), and the *Hicklin* and *Horne cases, supra*, all hold that it must be foreseen that the negligence would **probably** result in injury of some kind to someone. Again *Boyleston v. Southern Ry. Co.*, 211 S. C. 232, 44 S. E. (2d) 537 (1947), holds that one cannot

be deemed responsible for "injuries which, though possible, were wholly improbable."

Respondent urges that injury from a camber maladjustment (assuming Ford's responsibility therefor) is wholly improbable in the light of the evidence before the Court. A small amount of excessive, but smooth and uniform tire wear might be a probability, but wear is inevitable in any event. To go further and say that injury is the probable result of maladjusted camber is entirely unwarranted in the light of what is known about these factors of adjustment. Granted it is a possibility, but possibility alone is not enough to establish legal causation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully submitted.

NATHANIEL A. TURNER,
Counsel for Respondent.

November 15, 1958.